Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing	)	
Procedures to Be Followed When	)	
Formal Complaints Are Filed Against	)	
Common Carriers	)	

BELLSOUTH COMMENTS

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SUMMARY

The Commission should streamline its formal complaint rules, but should use as its model of reform its own pole attachment complaint rules rather than notice-pleading based models developed for use in Article III courts. The Commission should encourage pre-filing dispute resolution, well investigated, verified complaints that make out prima facie violations of the Communications Act, and should dismiss any complaint that does not conform to these requirements prior to service on the defendant carrier.

The Commission should make good faith settlement negotiations a jurisdictional prerequisite to the filing of a formal complaint. The Commission must be willing to dismiss any complaint which does not comply with this requirement. The Commission should adopt a rule establishing an electronic directory of agents authorized to receive service of process, and should encourage contemporaneous provision of a copy of the complaint to the defendant when it is filed with the Commission. The Commission should not, however, adopt a service of process rule that eliminates the Commission's pre-service review of the complaint for adequacy or the Commission's responsibility to serve the defendant carrier.

The Commission must not reduce the 30 day time period in which to answer a formal complaint. The time to answer should be measured from the day the defendant common carrier receives service of the complaint from the Commission following the Commission's own review of the complaint for adequacy. The Commission's intake form is a sound proposal that should be modified to eliminate overbroad information disclosures and the table of contents requirement, and to add notifications as to identical issues pending before industry bodies and waivers of Section 271(d) 90 day complaint resolution deadlines.

The Commission should not allow discovery of right in formal complaint proceedings, and should limit any information disclosure requirements to the facts necessary to make out a prima facie case in the complaint, a rebuttal presentation in an answer, and which will be relied upon in any subsequent brief. The Commission should designate contested matters of material fact to an administrative law judge only after every attempt to resolve the dispute in the preliminary status conference has been made.

Extraneous pleadings, such as replies, and motions for more definite statements, should be eliminated. Motions to compel discovery, if allowed at all, must be preceded by a good faith attempt to resolve the discovery dispute. Parties should be required to serve all pleadings by facsimile or overnight delivery service if they are also relying on the United States Postal Service's regular mail delivery option. Defendants must not be forced to bring "compulsory counter-claims" in the same formal complaint proceeding. In the absence of a hearing, petitioners for a cease or cease and desist order must post bond.

BellSouth addresses these and other procedural issues in more detail in its Comments. But in its simplest terms, the Commission's formal complaint process should be marked by rules designed to prevent the Commission from being the first place where problems are aired between common carriers and their customers and competitors. Private, pre-filing dispute resolution, well investigated, fact based pleadings supported by affidavit and other supporting materials, status conferences, legal and factual stipulations, timely and cooperative exchanges of pleadings and other communications, and briefing as deemed necessary by the Commission will enable the Commission to fulfill its statutory complaint resolution mandates.

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BELLSOUTH COMMENTS

BellSouth Corporation, by counsel and on behalf of its affiliated companies, files its comments in response to the Enforcement NPRM, initiated by the Commission in order to implement certain complaint provisions contained in the Telecommunications Act of 1996 "and to improve generally the speed and effectiveness of our formal complaint process."[1]

INTRODUCTION

The Telecommunications Act of 1996[2] imposes a five month deadline on the Commission to resolve formal complaints filed under Section 208 of the Communications Act,[3] and short

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[1] Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 96-238, FCC 96-460 (rel. November 26, 1996)("Enforcement NPRM") ¶ 1.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 to be codified at 47 U.S.C. §§ 151 et seq. (1996). The Communications Act of 1934, as amended, including the 1996 Act amendments, codified at 47 U.S.C. § 151 et seq., is referred to herein as the "Act."

[3] 47 U.S.C. § 208(b)(1).

deadlines to resolve complaints filed under several other sections of the Act.[4] The Commission therefore tentatively concluded that the pro-competitive goals and policies of the 1996 Act would be enhanced by applying the rules proposed in its Enforcement NPRM to all formal complaints, not just those enumerated in the 1996 Act, because applying the same standard procedures to all formal complaints will facilitate the filing process and help ensure consistent and uniform application of Commission rules.[5] BellSouth agrees. The Commission should not limit the standardization of complaint filing and adjudication procedures to Section 208 formal complaints, but to all formal complaints properly before the Commission, specifically including Section 224 pole attachment complaints.

Specifically, the Commission should look to its existing pole attachment complaint procedures as the model for reform of its formal complaint procedures.[6] The pole attachment complaint procedures require that a detailed, fact-based complaint be supported with extensive

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[4] See, e.g., 47 U.S.C. § 271(d)(6)(B)(unless otherwise agreed to by the parties to the complaint, Commission to act within 90 days on complaint concerning failures by Bell operating companies to meet conditions required for approval to provide in-region interLATA services); 47 U.S.C. § 260(b)(telemessaging services, final Commission determination within 120 days after receipt of complaint); 47 U.S.C. § 275(c)(alarm monitoring services, final Commission determination within 120 days after receipt of complaint).

[5] Enforcement NPRM ¶ 2.

[6] The Commission has referred to its pole attachment complaint procedures in two important respects in its Enforcement NPRM: in its proposal to allow the Common Carrier Bureau to designate disputed issues of material fact for hearing, Enforcement NPRM at n.88, and its proposal to allow the Commission to make a determination of the sufficiency of complainant's damage calculation. Enforcement NPRM at n.120 and accompanying text. Moreover, the Commission's proposal to require pre-filing settlement negotiations is similar to a current requirement in the commission's pole attachment complaint rules requiring the complainant to include a brief summary of all steps taken to resolve the problem prior to filing. 47 C.F.R. §1.1404(i).

documentation and verifications detailing the alleged violations.[7] The Commission has an initial opportunity to assess the complaint for acceptance as to form before assigning it a file number.[8] The Commission has a further opportunity for summary dismissal if the complaint does not comply with the Commission's rules.[9] A defendant must answer the complaint within 30 days.[10] There is no discovery of right. The Commission may designate matters for hearing before an Administrative Law Judge ("ALJ").[11] These rules are a model of procedural economy. Conforming the Commission's formal complaint procedural rules to the pole attachment complaint model, with appropriate fine tuning, should facilitate the Commission's ability to resolve formal complaints under the new statutory deadlines.

Although procedural standardization and uniformity should go a long way to assist the Commission in resolving formal complaints within their mandated deadlines, the Commission must be cautious not to subordinate a defendant common carrier's right to due process and fairness to the agency's goal of expedience. The Commission has twice revised its procedural

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[7] 47 C.F.R. § 1.1404. The Commission need not adopt those aspects of Section 1.1404 of its rules that are peculiar to pole attachment complaints, such as petitions for stay.

[8] 47 C.F.R. § 1.1405.

[9] 47 C.F.R. § 1.1406(b). Cf. 47 C.F.R. § 1.728.

[10] 47 C.F.R. § 1.1407(a). A defendant's time to answer a formal complaint, however, must be measured from the defendant's receipt of service by the Commission of a complaint that complies with the Commission's rules, makes out a prima facie violation of the Act, and sets forth required rebuttal disclosures. See infra, n. 27 and accompanying text, and p. 13. In keeping with its proposals in the Enforcement NPRM, the Commission should consider eliminating the opportunity for a reply to an answer in both its formal complaint and pole attachment complaint proceeding.

[11] 47 C.F.R. § 1.1411. In the event a matter is referred for hearing, there are opportunities for discovery pursuant to the Commission's hearings proceedings procedural rules. See 47 C.F.R. §§ 1.246 (request for admissions), 1.311-1.325 (interrogatories, depositions, document discovery, *inter alia*).

rules in light of complaint resolution deadlines mandated by Congress, most recently in 1993.[12] Although the new deadlines are severe, they do not, in several important respects, undermine the Commission's 1993 determinations.

The Commission should look first to its own pole attachments complaint procedures as a basis for reform of its formal complaint rules. The Commission should be wary of modeling procedural reforms on notice-pleading based "models of litigation efficiency, including the Federal Rules of Civil Procedure and the 'rocket docket' procedures utilized in the U.S. District Court of the Eastern District of Virginia."[13] In these models discovery is used for the subsequent development of facts to meet the theories noticed in the complaint, the veracity of which are tested at trial. Such models are not likely to "improve generally the speed and effectiveness" of the Commission's own fact-pleading system in which discovery has always had a relatively circumscribed role.[14] *Fact* pleading, as opposed to *notice* pleading, has always been and, by statute, must continue to be, the fundamental difference between the Commission's formal complaint procedural rules and the rules that apply in Article III[15] courts.

Section 208(a) of the Communications Act, the cornerstone of the Commission's formal complaint procedures, states:

> Any person. . .complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition *which shall briefly state the facts. . .*[16]

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12 Enforcement NPRM ¶ 15.

13 Enforcement NPRM ¶ 22.

14 AMC v. FCC, 50 F.3d 35, 40 (D.C. Cir. 1995).

15 U.S. Const. Art. III.

16 47 U.S.C § 208(a); *cf.* Fed. R. Civ. P. 8(a) A pleading which sets forth a claim for relief. . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.).

The Commission has long recognized that:

> [f]ormal complaint proceedings, unlike court litigation or administrative trial-type hearings, are often resolved solely on the written pleadings. These pleadings must therefore stand on their own and provide the factual underpinnings for a decision on the merits. By requiring fact pleading at the outset, many complaints can be swiftly resolved, reserving discovery procedures for the more complex cases. Reliance on notice pleading, followed by submission of facts, is inappropriate for many formal complaint proceedings and might inject unnecessary delay into the proceedings.[17]

In recognition of this distinction, the Commission's current formal complaint procedural rules provide for a minimum of pleadings.[18] Discovery by right is limited to 30 interrogatories by each party within a built-in discovery cut-off date.[19] Briefs, when required by Commission or desired by the parties, are filed concurrently and replies are due within 20 days.[20] Although the Commission refers to "delays that occur *under* our current rules,"[21] BellSouth is unaware of any reported Commission memorandum opinion in which a final Commission resolution was delayed beyond statutory mandate *because* of its current rules.[22]

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17 Amendment of Rules Governing Procedures to be Followed Where Formal Complaints are Filed Against Common Carriers, Report and Order, 3 FCC Rcd 1806, 1807 ¶ 8 (1988) ("1988 Report & Order").

18 47 C.F.R. §§ 1.724 et seq.

19 47 C.F.R. §1.729(a).

20 See, generally, 47 C.F.R. §1.732.

21 Enforcement NPRM ¶ 21 (emphasis added).

22 Article III and state courts adopt procedural requirements to speed resolution of contested matters because of documented case backlog. The Enforcement NPRM provides no information about the Commission's current formal complaint backlog, if any, the average length of time it takes to resolve a complaint that is ripe for decision on the merits, or the Commission's record in meeting complaint resolution deadlines under its current rules.

The Commission's current rules are best modified by keeping the current emphasis on fact pleadings, eliminating unnecessary pleadings, and conforming them to current pole attachment complaint procedures. What should be borrowed from Article III court-derived procedural codes are firm requirements that parties seek to resolve their disputes in good faith prior to filing any formal complaint or cross-complaint and prior to filing any post-complaint motion for any Commission order. What should not be borrowed from Article III courts are procedures designed to facilitate discovery, and engender fishing expeditions, and deadlines that are not consistent with a fact-pleading system. BellSouth will consider each of the Commission's proposals in the order in which they appear in the Enforcement NPRM.

A. Pre-Filing Procedures and Activities.

The Commission should add a requirement that a complainant certify that it discussed the possibility of a good faith settlement with the defendant carrier's representative prior to filing the complaint.[23] No complainant with a bona fide dispute should be unwilling in the first instance to undertake a good faith exploration of settlement before committing the resources of the Commission and each party to resolve a complaint. If the potential complainant does not know the appropriate person within the carrier's organization with whom to discuss settlement, it should inquire of the carrier's designated agent for service of process in Washington, D.C.

The Commission must be willing to enforce such a rule, however, by dismissing any complaint which does not contain the appropriate certification or where the certification was not made in good faith. In BellSouth's experience, complainants increasingly file simultaneous complaints and press releases prior to BellSouth learning of any dispute, thus deliberately creating

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[23] Enforcement NPRM ¶ 28.

a surrounding cloud of public sensation, tension and acrimony not conducive to amicable negotiations. A demand letter alone cannot constitute a good faith attempt at settlement. BellSouth doubts whether a mere exchange of perfunctory letters is evidence of a good faith attempt at settlement. A good faith settlement discussion should include a substantive interchange over disputed facts and an affirmative indication from the carrier that it is unwilling to settle a specific problem identified by the Complainant on terms agreeable to the complainant.[24]

The Commission seeks comment on whether a committee composed of neutral industry members would serve a needed role or useful purpose in addressing disputes over technical or other business disputes, before such disputes are brought before the Commission in the form of a formal complaint action that must be resolved under expedited procedures.[25] Pre-complaint,

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[24] Recently, BellSouth received a request out of the blue from lawyers for two CATV trade organization's for proprietary business information. Although the request referred to the Commission's second interconnection order, the letter was sent before the effective date of the Order, demanded that the information be disclosed within 20 days, cited no Commission authority for the information request or its timing, and contained no complaint of any term or condition of any pole attachment agreement. A BellSouth lawyer responded immediately with a polite letter denying the document request but specifically inviting the lawyers to call him to discuss settlement of any good faith dispute over any pole attachment rate. The cable lawyers subsequently filed a "combined" Section 208/Section 224 complaint against BellSouth (simultaneous with press releases), complaining, for the first time, of a specific rate for conduit rental and certifying that they had discussed settlement with BellSouth pursuant to the Commission's pole attachment complaint procedural rules. While BellSouth has steadfastly objected to this characterization of events as meaningful settlement discussions, the cable lawyers have steadfastly maintained that BellSouth's letter inviting settlement was an obvious attempt to stonewall their clients and that further settlement efforts would obviously be fruitless. While the Commission cannot prescribe professionalism, civility, decency or courtesy, it must be willing to give more than lip service to any pre-filing settlement discussion requirement.

[25] Enforcement NPRM ¶ 28. The Commission also asks whether outside experts would be needed to address the technical issues likely to arise in formal complaints and, if so, whether use of a committee of such experts would expedite the resolution of complaints within the statutory time frames. Id. The Enforcement NPRM does not state the extent to which the Commission has relied on such outside experts in the past or will need to rely on such outside experts in the future. BellSouth cannot predict whether the Commission will need outside experts to address technical (Continued...)

voluntary participation in such a proceeding, perhaps in conjunction with an arbitration arrangement or other alternative dispute resolution ("ADR") process, could be highly effective. The Commission should, in any event, safeguard against attempts to invoke the Commission's formal complaint process, with its abbreviated resolution deadlines, to resolve technical issues that are currently pending before industry bodies. The Commission should require parties seeking the resolution of such technical issues to exhaust their remedies before such bodies prior to filing any complaint, and to attach the final determination of the technical issue to their complaint as proof of compliance.

B. Service.

The Commission states that service of formal complaints must be accelerated to accommodate the complaint resolution deadlines in the 1996 Act.[26] BellSouth supports the Commission proposal to establish and maintain an electronic directory of agents authorized to receive service of complaints on behalf of carriers that are subject to the provisions of the Act and of the relevant Commission personnel who must be served.[27] Under either of the Commission's proposals for effecting service of process, however, the Commission's current practice of conducting a preliminary staff review as to the adequacy of the complaint under the Commission's rules will be effectively eliminated. The Commission must not eliminate this critical juncture in

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or business issues that may arise in formal complaints. The Commission, as expert agency, should be able to resolve bona fide complaints arising out of the Act, and allow standards and other technical issues to be resolved in existing industry fora. Once a complaint is filed, the Commission may not be able to rely on the deliberative efforts of such bodies to assist in the timely resolution of a formal complaint.

[26] Enforcement NPRM ¶ 30.

[27] Enforcement NPRM ¶ 33.

the formal complaint process. A complaint must not be served by the Commission on a defendant carrier until the Commission has first made a determination that the complaint both complies with applicable Commission rules and makes out a prima facie violation of the Act, and until the Commission has clearly identified the specific evidence and arguments for which defendant common carriers will have the burden of production to rebut complainant's prima facie case.[28] The Commission must also be willing to resolve complaints that are procedurally defective upon motion by the defendant in its answer or in subsequent motion.

For this reason, BellSouth agrees with the Commission that its proposed "intake form" could be a useful tool to both speed the preparation and filing of complaints and avoid or reduce the time and resources involved in processing procedurally defective or substantively insufficient complaints.[29] BellSouth recommends several amendments to the Commission's proposed intake form as set forth at Exhibit B in the Enforcement NPRM. First, no facts can be in dispute until the factual allegations of the complaint are met in the defendant's Answer. Therefore, the identity disclosures required in the intake form should not be limited to "disputed" facts, but to all facts set forth in the complaint that make out a prima facie violation of the Act and which will be relied upon by the complainant in any subsequent brief. Second, in BellSouth's experience, formal complaints that exceed ten pages are nevertheless organized in numbered paragraphs. Multiple claims are generally set out in separate counts. There is thus no practical reason for the Commission to require a Table of Contents for complaints exceeding ten pages in length. A

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[28] See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-489 (rel. December 24, 1996) ("Non-Accounting Safeguards Order"), ¶ 340.

[29] Enforcement NPRM ¶ 34.

dismissal of a complaint for failure to include a Table of Contents would elevate form over substance, and subordinate fairness to expedience.

Finally, where a formal complaint requires, for its resolution, resolution of a technical or standards issue pending before industry bodies, the intake form should require the complainant to certify to this fact and to attach as an exhibit to the complaint the final determination of the industry body determining the issue. Where a complaint is based on an alleged violation of Section 271(d) of the Act, the intake form should provide a space where the Commission can determine whether the parties have agreed to waive the 90 day complaint resolution deadline.

Section 208 expressly requires the Commission to forward the Section 208 complaint petition to the common carrier.[30] Thus the Commission does not have statutory authority to require service on the defendant's agent in lieu of service by the Commission.[31] Any attempt by the Commission to accelerate service by promulgating a rule whereby a complainant is required to serve the defendant carrier directly as an agent for the Commission for that limited purpose[32] must not operate to undermine or abrogate the Commission's responsibility to determine the procedural and evidentiary sufficiency of the complaint in the first instance. BellSouth supports the concept embodied in the Commission's proposed corollary rules that the defendant be provided with notice of intent to file a formal complaint as well as a copy of the formal complaint on or before the day the complaint is filed with the Commission, and that all subsequent pleadings and letters

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30 47 U.S.C. § 208(a).

31 Enforcement NPRM ¶ 31.

32 Id.

be served by overnight delivery or by facsimile transmission followed by regular mail.[33] The Commission should amend its rules to require that all counsel signing pleadings include a facsimile number in the signature block, or a statement that there is no facsimile number, in order to facilitate subsequent facsimile or overnight delivery service of post complaint pleadings and letters, and to clarify that service by hand or courier delivery within twenty-four hours is acceptable.[34]

C. Format and Contents Requirements.

BellSouth generally agrees with the Commission's proposed requirements that full statements of relevant facts, and supporting documentation and affidavits, be contained in any pleading required in the Complaint process.[35] The Commission should prohibit complaints that rely solely on assertions based on "information and belief."[36] Moreover, the Commission should not allow any allegation based on "information and belief," which is an allegation more appropriate to notice-pleading rather than fact pleading to support any part of a prima facie case. If a complainant does not have sufficient facts to support an affidavit, it should develop those

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[33] Enforcement NPRM ¶ 35. A defendant's time to answer, however, must not run until the defendant has been served by the Commission with a complaint that (1) complies with the Commission's procedural rules, (2) makes out a prima facie violation of the Act, and (3) contains a statement, prepared by the Commission, of the specific evidence and legal arguments for which defendant will have the burden of production to rebut complainant's prima facie case. Non-Accounting Safeguards Order at ¶ 345.

[34] In BellSouth's experience, complainants rely on the U.S. Mail to serve pleadings, notwithstanding the ready availability of facsimile machines and overnight services (and their previous use by complainants in demand letters). A pleading mailed from Washington, D.C. to Atlanta, can take anywhere from 7-10 days, severely affecting BellSouth's ability to respond effectively within short deadlines.

[35] Enforcement NPRM ¶ 37.

[36] Enforcement NPRM ¶ 38.

facts before filing a formal complaint and wasting the Commission's time considering the merits of the complaint and inevitable subsequent discovery motions.

BellSouth agrees with the Commission's tentative conclusion that a complainant should append to its complaint documents and other materials to support the underlying allegations and request for relief, and that failure to append such documentation to a complaint will result in summary dismissal of the complaint.[37] BellSouth further supports the Commission's tentative conclusion that it should revise its rules to require more specifically that a complaint include a detailed explanation of the manner in which a defendant has violated the Act, Commission order, or Commissions rule in question.[38] BellSouth does not object to the Commission's proposed requirement that all pleadings that seek Commission orders contain proposed findings of fact and conclusions of law with supporting legal analysis, and that any proposed order be specifically identified as such and conform to the format of a reported FCC Order.[39]

BellSouth is concerned that the Commission's information disclosure requirement, adopted from notice pleading rules, and will only delay resolution of fact-pleaded formal complaints.[40] The rule, as crafted, is overbroad, insofar as the information and description of things to be disclosed are defined generally as all those things which are "discoverable" or

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[37] Enforcement NPRM ¶ 39. The example cited by at Enforcement NPRM paragraph 39 is, ironically, not an appropriate matter for resolution through the Section 208 process. The Commission should not review negotiated agreements under Section 251 of the Act. If the parties have contracted voluntarily and the state commission approves the agreement under Section 252(e), the matter is at an end. If the state commission is required to arbitrate the agreement, a party aggrieved by that decision may, as a straightforward matter of statutory construction, seek review exclusively in the federal district court. 47 U.S.C. § 252(e)(6).

[38] Enforcement NPRM ¶ 40.

[39] Enforcement NPRM ¶¶ 41, 42.

[40] Enforcement NPRM ¶ 43.

"relevant." Although the Commission notes that the proposed rule comports with an analogous requirement under the Federal Rules of Civil Procedure, not all district courts, and apparently not even the United States District Court for the Eastern District of Virginia, on whose "rocket docket" the Commission models many of its proposed procedural reforms, have opted to employ this rule.[41]

The scope of the Commission's proposed disclosure requirement is much too global for the formal complaint process and is likely only to lead to serious deviation from the issues at hand, prolonged fishing expeditions and discovery disputes, thus hindering the Commission's ability to meet its statutory deadlines. Moreover, they impose an asymmetrical burden on defendant carriers and complainants. Complainants have the luxury of conducting a two year, extensive search of all discoverable and relevant information, persons and documents prior to filing a complaint. Defendant carriers have no such luxury, and are constricted by already minimal complaint and interrogatory response deadlines. It would be unfair, and would not comport with due process, to heap an additional and global information disclosure requirement upon defendants. The scope of any information disclosure requirement imposed upon a complainant should be limited to the identification of individuals or documents on whom the complainant relies to make a factual allegation in a pleading supporting its prima facie case or upon which it will rely to make an argument in a subsequent brief. The scope of any information disclosure requirement imposed upon a defendant common carrier should be limited to the identification of

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[41] U.S. Code Congressional & Administrative News, Pamphlet No. 3, May 1996, Summary of Federal District Courts' Response to Rule 26 Amendments - Implementation of Disclosure in United States District Courts at G-73, G-94 (March 22, 1996) ("Rule 26(a)(1), which requires initial disclosure, has been more frequently rejected than have the other sections of Rule 26").

individuals or documents on which defendant will rely to rebut the complainant's prima facie case, or upon which it will rely to make an argument in a subsequent brief. The Commission should, in the first instance, determine the procedural and legal adequacy of the complaint, and require disclosure by the defendant with its answer only those individuals or documents required to prove the evidence or arguments necessary to rebut the prima facie case.

D. Answer.

The Commission must not reduce the permissible time for a defendant to file an answer to a complaint from 30 to 20 days after service or receipt of the complaint.[42] In 1993 the Commission stated:

> With respect to answers to complaints, it is important that defendants are not unduly hampered in responding to the charges against them. We believe those parties opposing the reduced deadline have explained that the different procedures and requirements imposed by the Commission's rules and the Federal Rules of Civil Procedure justify different deadlines for parallel proceedings. In addition, these commenters have presented reasonable evidence that given the possible difficulties of gathering information regarding transaction up to two years old, the proposed time reduction would unreasonably impair a defendant's ability to answer fully the complainant's allegations without yielding a benefit sufficient to mitigate this added burden.[43]

The Commission's proposed reduction is not consistent with changes the Commission has proposed regarding the form and content of pleadings and will, in fact, unduly prejudice the rights of defendant carriers. The 90 day resolution deadline for complaints filed under Section 271, the

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[42] Enforcement NPRM ¶ 47. Further, the defendant's time to answer must run from its receipt of service of the complaint by the Commission following the Commission's initial determination of procedural and legal adequacy as well as the Commission's determination of any appropriate information disclosure in support of defendant's rebuttal evidence and arguments.

[43] Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers, Report and Order, 8 FCC Rcd 2614, 2616 (1993) ("1993 Report & Order").

single statutory reason cited by the Commission for reversing its considered 1993 decision, is, as the Commission notes, subject to modification by agreement of the parties. None of the other resolution deadlines will be impacted by allowing defendant carriers adequate time to prepare their responses to the factual allegations pleaded in the complaint. Although discovery, pleading, and other procedural rules impact the parties in similar ways, a truncated answer period is by its very nature unduly burdensome for defendants alone. A complainant may take up to two years to prepare its complaint, yet a defendant would have a mere 20 days to respond. The Commission has not offered a compelling reason why basic due process and fairness should be subordinated to administrative expedience, and why its previous determination should be overturned.[44]

E. Discovery

In light of the Act's new complaint resolution deadlines, there should be no discovery of right in formal complaint proceedings, as with the Commission's pole attachment complaint procedures. The Commission, even while maintaining limited self-executing discovery through interrogatories in its existing formal complaint rules, has long recognized that discovery is not necessary in all cases.[45] The Commission should end discovery of right in its formal complaint

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[44] The Commission merely offers that the "1996 Act imposes greater burdens on complainants and defendants, as well as the Commission" as rationale for compromising a defendant's ability to answer a formal complaint. Enforcement NPRM at ¶ 47. This is suspect reasoning. BellSouth has identified no part of the Act imposing any greater burden on complainants, indeed, the Commission has identified parts of the Act which it interprets to authorize the Commission to grant extraordinary prospective injunctive relief in the absence of a show cause hearing, a departure from established practice and procedure. Enforcement NPRM at 60. Regardless of any mandated resolution deadline, even one as short as 90 days, a thirty day response time for an Answer is the minimum time necessary to adequately defend a formal complaint. That still leaves the Commission anywhere, depending on the length of the Commission's initial assessment of the complaint, from 60 to 120 days to resolve a complaint.

[45] 1993 Report & Order, 8 FCC Rcd at 2618, ¶ 24.

proceedings, or, at a minimum, resist all efforts to expand the existing scope of discovery in complaint proceedings. Full discovery under the Federal Rules of Civil Procedure is always available, at the complainant's option, in the United States District Courts.[46]

If the Commission were to modify its formal complaint rules along the lines of its pole attachments complaint rules, discovery would only be had on those issues designated for hearing, and then only to the extent deemed necessary by the ALJ. In the alternative, under the Commission's proposed rules, parties will be thrashing out many issues in pre-filing dispute resolution efforts. Parties will be obligated to stipulate to facts and identify key legal issues five days after the defendant's answer is filed.[47] Within five days of this stipulation, a mandatory status conference will be held.[48] It is at these mandatory staff conferences where issues such as the need, scope and extent of discovery can be decided. In any event, the Commission should continue to discourage the filing of any discovery pleadings or materials with the Commission.

The Commission proposes to amend its rules to authorize the Common Carrier Bureau, on its own motion, to refer such disputes to an ALJ for expedited hearing on factual issues, but not to make legal determinations of the consequences of such issues.[49] As stated before, such referrals will trigger another level of Commission procedural rules, including opportunities for discovery which should be examined with respect to their appropriateness in a formal complaint

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[46] As the Commission has previously observed, "we have resisted attempts to turn the formal complaint process into federal court litigation. Parties desiring traditional court litigation, rather than an administrative law setting, may of course seek redress in the appropriate court rather than at this Commission." 1988 Report & Order, 3 FCC Rcd at 1813.

[47] Enforcement NPRM ¶ 80.

[48] Enforcement NPRM ¶ 50.

[49] Enforcement NPRM ¶ 56.

proceeding subject to a short resolution deadline.[50] The Commission staff should only make such a referral in extraordinary circumstances, after all attempts at resolving any dispute over material facts have been explored in during the course of the mandatory status conference.

F. Status Conference

BellSouth supports the Commission's proposed procedural amendments with respect to an initial status conference to take place within 10 days after the defendant files its answer to the complaint.[51]

G. Cease, Cease & Desist Orders and Other Forms of Interim Relief.

Interim relief in the form of cease or cease-and-desist orders must be based on specific allegations and supporting documentation provided in the complaint. A complaint failing to address these minimum legal and evidentiary standards would provide no basis upon which interim relief could be granted. The Commission has followed, and should continue, to follow the legal and evidentiary standards set forth in Virginia Petroleum Jobbers Association v. FPC., 259 F.2d 921, 925 (D.C. Cir. 1958). There is neither reason nor legal authority to depart from that precedent. In various provisions of the Act the Commission is authorized to issue a cease-and-desist order without an express requirement of instituting a Section 312 hearing.[52] In lieu of such a hearing requirement, due process requires that an appropriate bond be posted by the complainant prior to granting interim relief.

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[50] If, unlike the current pole attachment complaint procedures, the Commission preserves or expands discovery rights in formal complaint proceedings prior to designation for hearing, it should not allow further discovery in designated hearings.

[51] Enforcement NPRM ¶ 58.

[52] Enforcement NPRM ¶ 60.

H. Damages.

Although conceptually bifurcation of liability and damage issues would appear to be a solution to the truncated complaint resolution deadlines imposed by the Act, such issues are not always susceptible to bifurcation. Furthermore, the Commission's proposes requirements that complaints seeking an award of damage contain a detailed computation of damages should enable the parties to identify damages issues clearly in the first instance. In the event of bifurcation, and a finding of liability, subsequent mediation or referral to a special master should be an option available to litigants.

I. Cross-complaints and Counterclaims

BellSouth opposes the Commission's proposal to require that compulsory counter-claims, defined according to the Federal Rules of Civil Procedure, be brought with the Answer or be barred.[53] Defendant carriers have barely enough time to investigate and answer the factual allegations contained in a complaint, let alone to develop a case for a claim or a cross-claim, investigate all of the facts, interview the necessary witnesses, prepare the requisite affidavits, undertake legal research, engage in pre-filing dispute resolution efforts and otherwise comply with the Commission's complaint requirements in addition to its procedural requirements with respect to its answer. The Enforcement NPRM does not cite a single example where a lack of a compulsory counter claim rule has prevented the Commission from deciding a formal complaint within the mandated resolution deadline. The Commission has not demonstrated that justice or due process will not be subordinated to expedience, and has not demonstrated how, in any event,

[53] Enforcement NPRM ¶ 70.

such a requirement will speed its resolution of the underlying complaint within the statutory mandate.

J. Replies.

BellSouth agrees that elimination of all replies to answers and motions, unless specifically authorized by the Commission, would facilitate the goal of procedural expediency without unduly impairing any parties' due process rights.[54]

K. Motions.

BellSouth agrees that the Commission should require that parties undertake good faith efforts to resolve all disputes before filing a motion to compel discovery. In light of this pre-filing requirement, a rule reducing the time to an opposition from ten to five days is acceptable to BellSouth, provided the good faith obligation is strictly enforced. The Commission should eliminate motions to make the complaint "definite and certain," but should clarify that it will entertain a motion to dismiss for failure to state a claim, or for failure to adhere to the Commission's procedural requirements for formal complaints, that is raised in the defendant carrier's answer. In order to require the complainant to ensure that the complaint is fully developed prior to filing, and to prevent the complainant from introducing new issues late in the development of the case, the Commission should prohibit amendment of complaints except for changes necessary under 47 C.F.R. § 1.720(g).[55]

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[54] Enforcement NPRM ¶ 72.

[55] Enforcement NPRM ¶ 78.

L. Confidential or Proprietary Information and Materials

BellSouth agrees that the Commission should revise its rules to allow parties to designate as proprietary any materials generated in the course of a formal complaint and not limit such designation to materials produced in response to discovery.[56] The Commission should expressly recognize that such materials need not be filed with the Commission in connection with a complaint or an answer, but must be served on the opposing party in connection with the Commission's existing confidentiality rules or an agreement between the parties.

M. Other Required Submissions.

BellSouth agrees to the proposal that a stipulation of facts and key legal issues be filed five days after the answer is filed.[57] The Commission should expressly allow unilateral statements of fact be filed where an opposing party cannot make itself available in time to submit a joint stipulation on time. BellSouth sees no reason that the Commission's current rules as they relate to legal briefs need to be modified in order to accommodate the Act's resolution deadlines, although page limits, which should be waived upon a showing of good cause, may help the parties frame the issues concisely. The staff should have the discretion to set briefing schedules, in conjunction with the parties, at the initial status conference.

N. Sanctions.

Rule 11 has engendered prolific controversy and attendant litigation in the federal courts. The Commission already has within its power sanction authority that should be exercised in a measured way to accomplish its goals in the just resolution of formal complaints. All the

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[56] Enforcement NPRM ¶ 79.

[57] Enforcement NPRM ¶ 80.

Commission needs to do is to require parties to a complaint proceeding to adhere strictly to the Commission's rules. Failure to follow the intake form should be cause for automatic dismissal. Failure to support a factual allegation adequately should result in the allegation being disregarded. Failure to engage in good faith settlement discussions should result in dismissal of a complaint, and failure to attempt to resolve a discovery dispute prior to filing a motion to compel should result in dismissal of the motion.

O. Other Matters.

The Commission raises several issues with respect to Section 271 complaints. First the Commission notes that Section 271 states that the Commission shall "act on" certain complaints within 90 days, but does not state that the Commission's action with respect to complaints alleging a violation of Section 271(d) must be "final," as is the case with certain other complaint provisions added by the 1996 Act. The Commission interprets this to mean that "act on" encompasses Bureau determinations whether a BOC has ceased to meet conditions required for approval to provide in-region interLATA services and the imposition of any applicable sanction, but need not necessarily be final action by the full Commission. This is a supportable reading of the Act.

Finally, the Commission notes that the 90 day complaint resolution deadline for Section 271(d) complaints applies only in the absence of an agreement otherwise by the parties to the complaint action, and seeks comment on the appropriate procedure or mechanism for early notice to the Commission of the parties' agreement to extend or waive the 90-day resolution deadline. This notification should be made on the formal complaint intake form. Such notification would